FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1979

ALPHONSE BIFULCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (A. 12-19) is reported at 600 F.2d 407.

JURISDICTION

The judgment of the court of appeals (A. 11) was entered on May 30, 1979. The petition for a writ of certiorari was filed on July 2, 1979, and was granted on October 9, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a special parole term may be imposed for conspiracy to violate the Comprehensive Drug Abuse Prevention and Control Act of 1970 when such a term is authorized for the object offense.

STATUTES INVOLVED

21 U.S.C. 841 provides in pertinent part:

(a) Unlawful Acts.

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) * * *

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine or not more

than $15,000 or both. * * * Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.[1]

(c) Special Parole Term

A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

21 U.S.C. 846 provides:

Any person who attempts or conspires to commit any offense defined in this subchapter is

[1] This subsection was amended by Congress in 1978 to conform it to another amendment prohibiting possession of piperidine. See Pub. L. No. 95-633, 92 Stat. 3774, Title II, Section 201, and note 5, *infra*. The amendment is not pertinent to the issue presented by this case.

punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT

1. Following a jury trial in the United States District Court for the Eastern District of New York, petitioner and two co-defendants were convicted of conspiring to manufacture, distribute, and possess with intent to distribute phencyclidine, a Schedule III controlled substance, in violation of 21 U.S.C. 846.[2] Petitioner was fined $1,000 and was sentenced to four years' imprisonment, to be followed by a five year term of special parole. The court of appeals affirmed by judgment order (Pet. App. 1).

Thereafter, petitioner filed a pro se motion to vacate his sentence under 28 U.S.C. 2255. He claimed that the court should not have imposed a term of special parole because such a punishment is not expressly authorized by the drug conspiracy statute, 21 U.S.C. 846 (A. 3-7). The motion was denied (A. 8-9).

2. The Second Circuit affirmed, adopting the reasoning of *United States* v. *Burman*, 584 F.2d 1354 (4th Cir. 1978), cert. denied, 439 U.S. 1118 (1979), and *United States* v. *Jacobson*, 578 F.2d 863 (10th

[2] The statement in the court of appeals decision (A. 12) that petitioner was charged with but acquitted on two counts of substantive violations of Section 841(a)(1) is erroneous. See Pet. Br. 3 n.2 and Addendum I.

Cir.), cert. denied, 439 U.S. 932 (1978). The court held that the proper penalty for a Section 846 conspiracy offense is determined by reference to the penalty authorized for the offense that was the object of the conspiracy, in this case 21 U.S.C. 841(a)(1). Because Section 841(b) mandates a special parole term whenever a sentence of imprisonment is imposed for a violation of Section 841(a)(1), the court held, it likewise must be imposed for conspiracy to violate that section (A. 16-17).

SUMMARY OF ARGUMENT

The structure and history of the Comprehensive Drug Abuse Prevention and Control Act of 1970 combine with common sense to dictate the conclusion that a special parole term must be imposed as part of a sentence for drug conspiracy whenever such a penalty is mandated for commission of the substantive offense that is the object of the conspiracy.

The section of the Drug Abuse Act prohibiting conspiracies, 21 U.S.C. 846, does not itself contain a penalty scheme. Instead, it incorporates by reference the sentencing provisions of the Act's substantive offense sections, some of which—the sections defining the more serious crimes—mandate that a term of special parole be appended to every term of imprisonment. It is thus apparent from the very structure of the Drug Abuse Act that special parole terms, where appropriate for object offenses, must be imposed for conspiracies as well.

The fact that Section 846 speaks specifically of fines and imprisonment and makes no mention of special parole does not detract from this view. The intent of Congress to authorize fully coterminous sentences for conspiracies and underlying substantive offenses is clear. Prior to the enactment of the Drug Abuse Act, federal drug laws authorized identical penalties for conspiracies and completed offenses. The Drug Abuse Act did not disturb this historical congruence. It was designed to consolidate existing legislation, eliminate its inconsistencies and inadequacies, and establish a more realistic sentencing structure. However, at no time during the consideration of the initial bill or any of the amendments and substitute bills that followed did anyone in Congress even suggest that sentences for conspiracy and underlying substantive offenses should differ.

Even after the concept of special parole was introduced by the Department of Justice midway through Congress's consideration of what was to become the Drug Abuse Act, all indications were that the traditional congruence would continue. Thus, a Justice Department witness, after describing the various drug trafficking offenses for which special parole was to be authorized, turned to the proposed conspiracy section and explained to the House Ways and Means Committee that sentences for conspiracy would mirror those for underlying offenses. This view, and its implications for special parole, was not challenged, then or at any time prior to passage of the Act.

It thus is apparent that Congress's failure to include the term special parole in Section 846's boiler

plate was, at worst, inadvertent. However, in view of the Drug Abuse Act's structure and legislative history, inclusion of the term was not necessary for a clear understanding of the sentences authorized by the Act. Moreover, inasmuch as in every instance where special parole is authorized it is a mandatory adjunct of imprisonment, the use of the term "imprisonment" in Section 846 can and should be read as necessarily encompassing special parole.

Finally, structure and legislative history aside, it is inconceivable in view of the objectives of the Drug Abuse Act that Congress intended to withhold special parole as a means of penalizing conspiracy while mandating it for object offenses. In passing the Act, Congress sought to make it possible for sentencing judges to tailor sentences to individual offenders, and in the case of major traffickers to impose sentences stringent enough to deter misconduct. Special parole was viewed as well-suited to these ends. It would provide a means of fostering rehabilitation through an additional period of supervised community release. At the same time it held the promise of operating as a powerful deterrent to repetition of criminal behavior, since parole revocation would result in imprisonment for a period equal to the special parole term, undiminished by time actually spent on parole. Trial judges would be left free to fix whatever special parole term, above a statutory minimum, they deemed appropriate for a given offender.

In terms of gravity of conduct, need for additional deterrence and rehabilitation, or any other criterion,

there exists no rational basis for concluding that the Congress that fashioned the remedy of special parole for persons engaged in distribution of dangerous drugs could have wished to discard that remedy in the case of persons convicted of conspiring to commit such offenses. Rather than ascribe any such irrational distinction to the Congress, this Court should construe Section 846, as it doubtless was intended, to require imposition of special parole terms whenever such terms are required for the object offense.

ARGUMENT

IMPOSITION OF A SPECIAL PAROLE TERM IS MANDATED FOR A DRUG CONSPIRACY OFFENSE WHENEVER SUCH PENALTY IS MANDATED FOR THE OBJECT OFFENSE

A. The Drug Abuse Prevention and Control Act of 1970 is Structured to Incorporate into the Conspiracy Statute the Penalty Provisions of the Substantive Offense Statutes, Including Special Parole

Petitioner contends (Pet. Br. 10-23) that because 21 U.S.C. 846 refers only to "imprisonment or fine or both" and does not expressly authorize imposition of special parole as a penalty for conspiracy to violate the federal drug law, his sentence to a term of special parole constitutes an impermissible expansion of the statute's sentencing provisions. This argument is inconsistent with the framework of the larger statute of which Section 846 is a part, the Comprehensive

Drug Abuse Prevention and Control Act of 1970 (hereinafter referred to as the "Drug Abuse Act").[3]

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[3] For this reason it has been rejected by five of the six circuits that have addressed the question. In addition to the Second Circuit, the Fourth, Fifth, Eighth, and Tenth Circuits have expressly upheld the imposition of special parole terms for drug conspiracy offenses. *United States* v. *Sellers*, 603 F.2d 53 (8th Cir. 1979), petition for cert. pending, No. 79-5485; *Cantu* v. *United States*, 598 F.2d 471, 472 (5th Cir. 1979); *United States* v. *Burman*, 584 F.2d 1354 (4th Cir. 1978), cert. denied, 439 U.S. 1118 (1979); *United States* v. *Jacobson*, 578 F.2d 863, 867-868 (10th Cir.), cert. denied, 439 U.S. 932 (1978). See also, *United States* v. *Dankert*, 507 F.2d 190, 191 (5th Cir. 1975) (sustaining imposition of a special parole term under the drug importation conspiracy statute, 21 U.S.C. 963, which contains language identical to that of Section 846.)

Moreover, in *Timmreck* v. *United States*, 577 F.2d 372, 373 (6th Cir. 1978), rev'd on other grounds, No. 78-744 (May 21, 1979), the Sixth Circuit assumed that it was necessary to add a term of special parole to a sentence of imprisonment for a drug conspiracy conviction under Section 846. In reversing that court's holding that failure to inform the defendant about the mandatory special parole term upon accepting his plea of guilty to the conspiracy offense justified collateral relief under 28 U.S.C. 2255, this Court also assumed that special parole was "required by the applicable statute." *United States* v. *Timmreck, supra*, slip op. 2 & n.2. Special parole terms have regularly been upheld in connection with drug conspiracy offenses in other cases as well. *United States* v. *Moreno*, 569 F.2d 1049 (9th Cir. 1978); *United States* v. *Scholle*, 553 F.2d 1109 (8th Cir.), cert. denied, 434 U.S. 940 (1977); *United States* v. *De La Fuente*, 550 F.2d 309 (5th Cir. 1977); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 794-795 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977); *United States* v. *Wiley*, 519 F.2d 1348 (2d Cir. 1975); *United*

It is well settled that "a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling [its] responsibility in interpreting legislation [this Court] 'must be not guided by a single sentence but should look to the provisions of the whole law * * *'." *Richards* v. *United States*, 369 U.S. 1, 11 (1962) (footnote omitted). Accord, *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974); *Labor Board* v. *Lion Oil Co.*, 352 U.S. 282, 288 (1957). See *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 402-403 (1975); *United States* v. *Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1850); 2A J. Sutherland, *Statutes and Statutory Construction* § 46.05 (1973). In this respect, "courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions * * *." *United States* v. *Bass*, 404 U.S. 336, 344 (1971). Indeed, even in the context of sentencing provisions in penal statutes, a single phrase should not be construed in isolation from the statutory scheme as a whole when to do so would result in a meaning that contradicts or distorts "the fair import of the whole remaining language." *United States* v. *Brown*, 333 U.S. 18, 25-26 (1948); see, *e.g.*, *United States* v. *Campos-Serrano*, 404 U.S.

States v. *Rich*, 518 F.2d 980, 986-987 (8th Cir. 1975), cert. denied, 427 U.S. 907 (1976).

The Third Circuit alone has held that a special parole term may not be imposed as a penalty for drug conspiracy offenses. *United States* v. *Mearns*, 599 F.2d 1296 (3d Cir. 1979), petition for cert. pending, No. 79-415. Accord, *Fassette* v. *United States*, 444 F. Supp. 1245 (C.D. Cal. 1978).

293, 298 (1971); *United States* v. *Bass*, *supra*, 404 U.S. at 350-351.

Thus, standing alone, the isolated language upon which petitioner's argument focuses is not dispositive of whether a special parole term is a permissible penalty for a conspiracy offense. One must look to the statutory framework of the Act as a whole. We submit that although Section 846 "does not refer explicitly to [special parole], [t]he language, structure, and history of the statute * * * demonstrate that Congress meant to authorize" imposition of special parole whenever such a penalty is authorized for the target offense. *Dalia* v. *United States*, 441 U.S. 238, 249 (1979).

Sections 841 through 845 of the Drug Abuse Act (21 U.S.C. 841-845) define substantive offenses and establish a complex scheme of penalties for their commission. Specifically, Sections 841 through 844 define nine separate offenses, each with its own set of penalties based upon the type of transaction entered into and the nature and classification of the substance involved.[4] See Pet. Br. 15-17 (Table). With a single exception,[5] the authorized fine and imprison-

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[4] Section 812 of the Comprehensive Act, 21 U.S.C. 812, classifies controlled substances into five different schedules. Classification within these schedules is based upon a substance's potential for abuse, the extent to which the substance has a currently accepted medical use, and the likelihood that abuse will lead to dependency.

[5] See 21 U.S.C. 841(d) (possession of piperidine). Sections 841(b)(5) and 841(d) were added in 1978. Pub. L. No. 95-633, 92 Stat. 3774, Title II, Section 201. Section 841(b)(5) removed phencyclidine from Section 841(b)(1)(B)

ment [6] are doubled if the defendant has one or more prior convictions for violating the Act or any other federal law relating to abuse of specified controlled substances. Of the nine separate offenses, the four most serious mandate imposition of a special parole term whenever imprisonment is imposed.[7] See 21 U.S.C. 841(b)(1)(A), 841(b)(1)(B), 841(b)(2) and 841(b)(5). For second offenders, the minimum special parole term must be at least doubled. *Ibid.*

Section 845 establishes a different penalty scheme for violations of Section 841(a)(1) that involve distribution of controlled substances to persons under 21

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and increased the penalty for trafficking offenses involving that substance. Section 841(d) made possession of piperidine with intent to manufacture phencyclidine a separately punishable offense.

[6] Sections 841-845 fix the maximum fine and imprisonment that may be imposed; they do not prescribe minimums. Sections 841 and 845 fix the minimum special parole term that must be imposed; they do not prescribe maximums.

[7] Petitioner correctly notes (Pet. Br. 34) that Section 848 penalizes an offense more serious than those defined in Sections 841-845, and yet does not authorize a special parole term. That is because Section 848 adopts a wholly different, and more severe, sentencing scheme for persons who engage in a continuing criminal enterprise. For first offenders it fixes a term of imprisonment of *at least* 10 years and not exceeding life, a fine not exceeding $100,000, and forfeiture of profits from the enterprise and all property related to it. For persons previously convicted under that section, the minimum fine and term of imprisonment are doubled. Similarly, the fact that special parole is not authorized for "dangerous special drug offenders" under Section 849 has no bearing on the question presented here, since persons sentenced under that section are subject to imprisonment for up to 25 years.

years of age by persons 18 years of age and over. See pages 15-16, *infra*.

Section 846 prohibits conspiracies and attempts to commit the substantive offenses described in Sections 841 through 845. Unlike those sections, however, it has no specific sentencing provision. Instead, Section 846 incorporates by reference the sentencing provisions of the substantive offenses, and provides that conspiracies and attempts are punishable "by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the [substantive] offense, the commission of which was the object of the attempt or conspiracy." [8]

The question presented in this case is whether Congress's failure to include the words "special parole" in the quoted phrase manifests an intent to effect something less than a complete incorporation of

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[8] Subchapter II of the Comprehensive Act, governing the import and export of controlled substances, contains a similar sentencing structure. 21 U.S.C. 960 and 961 define substantive offenses and establish a penalty structure for violations. Section 960(b) imposes a mandatory special parole term whenever a sentence includes imprisonment. Section 962 provides for the enhancement of sentences for repeat offenders. Section 963, in language identical to that in Section 846, prohibits attempts and conspiracies to commit any offense defined in the subchapter and authorizes punishment "by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." Therefore, our submission that special parole must be imposed for a Section 846 conspiracy whenever it is a component of the punishment for the object offense is equally applicable to conspiracies under Section 963.

the sentencing provisions set out in the substantive offense sections. We submit that it does not. The very structure of the Act compels the conclusion that Congress intended to incorporate into the attempt and conspiracy section precisely the same combinations of penalties—fine, imprisonment, and, for the four most serious offenses, special parole—as set out in the substantive sections.

In structuring the Act so as to include attempts and conspiracies, Congress could have pursued any one of four basic approaches. Congress could have drafted: 1) substantive offense sections that fixed the punishment both for committing a forbidden act and for attempting or conspiring to do so; 2) a separate attempt and conspiracy section that included its own sentencing provisions; 3) a separate attempt and conspiracy section that incorporated by reference the sentencing provisions set out in the substantive offense sections; 4) a separate sentencing section that fixed punishments for both substantive offenses and attempts and conspiracies. Quite apparently, neither the first nor the fourth approach was adopted. Nor was the second, suggestions in petitioner's brief to the contrary (Pet. Br. 13-14) notwithstanding. Had it been, a judge could impose a sentence for drug conspiracy, relying solely on Section 846. That cannot be done as the statute is drafted. Absent reference to the substantive offense sections, the phrase "imprisonment or fine or both," upon which so much of petitioner's argument hangs, has no meaning. Thus, there can be no question that Congress meant

to incorporate by reference the sentencing provisions of the substantive offense sections. Nor is there anything about the structure of the Act that affords any basis for concluding that Congress intended to incorporate some punishment provisions but not others.

There is no merit to petitioner's contention (Pet. Br. 20-21, 31-32) that the express reference to special parole in Section 845 demonstrates a congressional intent to exclude that punishment from those available under Section 846. Unlike Section 846, Section 845 does not simply assimilate the penalty structure set forth in Section 841. Instead, under Section 845 fines and imprisonment of *up to* twice that authorized by Section 841(b) *may be* imposed for a first distribution to a minor, whereas special parole of *at least* twice the term authorized by Section 841(b) *must be* imposed.[9] In other words, even if a trial judge elects to limit the incarceration for a Section 845 offense to that authorized for one who distributes to an adult, he or she must at least double the special parole. It was therefore necessary in drafting Section 845 to treat the special parole aspect of imprisonment separately to make clear that regardless of whether incarceration is actually incremented as authorized, incrementation of special parole is mandatory. Given

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[9] Similarly, for repeat offenders under Section 845, fines and imprisonment of up to three times that authorized by Section 841(b) may be imposed and a special parole term of at least three times the term otherwise authorized must be imposed.

this dissimilarity in the sentencing schemes, the fact that special parole is expressly treated in Section 845 and not in Section 846 does not detract from the view that Section 846 incorporates special parole by necessary implication.

Even as a matter of simple linguistic analysis, however, the term "imprisonment" can and should be read as necessarily encompassing special parole. Special parole may never be imposed without imprisonment; conversely, imprisonment cannot be imposed without special parole. Thus special parole must always accompany imprisonment and is a mandatory adjunct of it. Consequently, like several of its sister circuits, the court below bottomed its decision on the view that Section 846's incorporation by reference of the imprisonment provisions of Section 841 effected an incorporation of both the incarceration and the special parole components of that section.

> From the wording in § 841(b)-(c), it would appear that Congress viewed the special parole term as being part of the term of imprisonment to which it is appended. * * *. It is impossible, therefore, to accept the argument that the parole term is to be imposed only where the charge is in violation of the substantive provision. It is logical to view the reference to imprisonment in § 846 as intending to incorporate all of the imprisonment provisions in § 841(b).

A. 15-17, quoting *United States* v. *Jacobson, supra,* 578 F.2d at 868. Accord, *United States* v. *Sellers, supra,* 603 F.2d at 59; *United States* v. *Burman, supra,* 584 F.2d at 1358.

B. The Legislative History of the Drug Abuse Act Demonstrates That Congress Intended The Conspiracy Statute to Incorporate By Reference All of The Penalties Authorized For Object Offenses, Including Special Parole

Although more explicit draftsmanship might have mooted any question concerning the applicability of special parole to drug conspiracy offenses,[10] the legislative history of the Drug Abuse Act demonstrates that Congress fully intended that the sentences authorized for conspiracy and its object offenses would be coterminous, and that special parole would not be an exception.

1. At the outset, we note that in ascertaining congressional intent "the source in previous legislation of the particular provision in question" is a

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[10] This Court has not hesitated, in an appropriate case, to look beyond inexact draftsmanship to determine the fair meaning of a criminal statute.

> We are mindful of the maxim that penal statutes are to be strictly construed. And we would not hesitate, present any compelling reason, to apply it and accept the restricted interpretation. But no such reason is to be found here. The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language * * *. Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

United States v. *Brown, supra,* 333 U.S. at 25-26 (citations omitted).

particularly helpful starting point. *United States* v. *Katz*, 271 U.S. 354, 357 (1926); see 2A J. Sutherland, *supra*, § 48.03 at 191. Prior to enactment of the Drug Abuse Act, federal drug laws were split between two separate titles of the United States Code. The Internal Revenue Code of 1954 established a structure regulating the taxation and dispensation of narcotics and marijuana, prohibiting purchase, sale, distribution and possession of the substances in violation of the taxation scheme. See 26 U.S.C. (1964 ed.) 4701-4705, 4742-4744, 7237. The Federal Food, Drug, and Cosmetic Act proscribed unauthorized manufacture, compounding, sale, delivery and possession of depressant or stimulant drugs. See 21 U.S.C. (1964 ed. Supp V) 331-333, 360a. And the Narcotic Drugs Import and Export Act prohibited the importation of narcotics and marijuana and the sale of heroin to juveniles. See 21 U.S.C. (1964 ed.) 171-174, 176a, 176b. Significantly, both the Internal Revenue Code and the Narcotic Drugs Import and Export Act provided that persons who conspired to commit an offense in violation of substantive provisions would be subject to the same punishments as prescribed for persons who committed a substantive offense. 21 U.S.C. (1964 ed.) 174, 176a, 176b; 26 U.S.C. (1964 ed.) 7237(a), 7237(b); see also 18 U.S.C. (1964 ed.) 1403(a).[11] Thus, prior to enact-

[11] For example 26 U.S.C. (1964 ed.) 7237(b) provided, in pertinent part:

> Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) or section 4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a second or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

ment of the Drug Abuse Act, the sentencing scheme established by Congress provided for complete congruence between sentences for substantive violations of the drug laws and sentences for conspiracy to violate those laws.

That Congress never intended to depart from this congruence is apparent from the Drug Abuse Act's legislative history. In 1969, the administration introduced legislation in both houses to effect a comprehensive revision of federal drug laws. S. 2637, 91st Cong., 1st Sess. (1969);[12] H.R. 13742 and 13743, 91st Cong., 1st Sess. (1969).[13] The express objectives of the bills included consolidation of existing drug legislation into a rational, coherent scheme, elimination of inconsistencies and inadequacies in ex-

[12] S. 2637 was designated the Controlled Dangerous Substances Act of 1969.

[13] The drug legislation transmitted to the House was divided into two bills. H.R. 13742, titled the Controlled Narcotic Drug Act of 1969, governed narcotic drugs and marijuana and was referred to the Committee on Ways and Means, since narcotic and marijuana abuse previously had been covered by the tax law. H.R. 13743, titled the Controlled Depressant And Stimulant Drugs Act of 1969, covered drugs previously regulated by the Federal Food, Drug and Cosmetic Act and was referred to the Committee on Interstate and Foreign Commerce. See H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., Pt. 1, 1-2 (1970).

isting law, and formulation of a more realistic sentencing structure. H.R. Doc. No. 91-138, 91st Cong., 1st Sess. (1969); *Narcotic Legislation: Hearings on S. 1895, S. 2590, and S. 2637 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 210-213 (1969) (hereinafter "S. 2637 Hearings"). During the same period, Senator Dodd introduced legislation that had the same principal features as the administration's bill. See S. 1895, 91st Cong., 1st Sess. (1969).[14]

The concept of special parole did not appear in any of these initial proposals. They provided only that substantive violations would be punished by imprisonment or fine or both. The sole significant variation in the sentencing provisions of the various bills was that Senator Dodd's proposal, S. 1895, eliminated mandatory minimum sentences for trafficking offenses. Each bill contained a provision identical to that now in Section 846—that conspiracy would be punishable by imprisonment or fine or both, not exceeding the maximum punishment prescribed for the object offense. See S. 2637, *supra*, § 504; S. 1895, *supra*, § 704; H.R. 13742, *supra*, § 504; H.R. 13743, *supra*, § 504.[15] It was clear that the drafters of each

[14] S. 1895 was titled the Omnibus Narcotic and Dangerous Drug Control and Addict Rehabilitation Act of 1969.

[15] The only distinction between these sections was that S. 1895 provided that the penalty for conspiracy would not exceed the maximum punishment for the object offense, but that the penalty for attempt would be limited to one-half the maximum punishment. The other sections provided that the penalty for both attempt and conspiracy would be the same as that authorized for the object offense.

of these bills intended to perpetuate the scheme for punishing drug conspiracy offenses that had existed under prior law—the penalty for conspiracy would be identical to the penalty for the object offense.

2. The circumstances under which special parole became a part of the Act indicate that Congress intended to maintain this congruence in sentencing structure. As the result of consultations between the Attorney General and the Senate Subcommittee to Investigate Juvenile Delinquency,[16] John Ingersoll, Director of the Bureau of Narcotics and Dangerous Drugs, presented to the subcommittee three different schemes for penalizing substantive violations of the proposed Act.[17] Each of the options included a special

[16] During the testimony of the Attorney General before the subcommittee, the administration's bill was criticized because of the severity of sentences authorized for casual distribution of controlled substances to minors and the retention of mandatory minimum penalties. The Attorney General agreed to review the proposal's penalty structure with the subcommittee's staff and to make additional recommendations after considering the views presented during subsequent testimony. S. 2637 Hearings at 255.

[17] The thrust of each of these options was to accord sentencing judges more flexibility in sentencing first offenders, casual distributors, and addicts, while permitting judges to treat professional traffickers with severity. See S. 2637 Hearings at 670-675, 678-682; see also *Drug Abuse Control Amendments—1970: Hearings on H.R. 11701 and H.R. 13743 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 90-91 (1970) (chart) (hereinafter "H.R. 13743 Hearings").

parole term as part of the sentencing structure for trafficking offenses. As Ingersoll explained to the subcommittee (S. 2637 Hearings at 676):

> [W]e have required a special parole term so that persons sentenced for trafficking violations would be placed under supervision for a period of time regardless of whether they are incarcerated or their sentence probated or suspended. The intent here is to give the judges another tool for sentencing and another means for protecting society when dealing with the drug violator.

The Justice Department's proposal concerning special parole met with the subcommittee's approval. Accordingly, the legislation as formulated by the subcommittee and reported out by the full committee, S. 3246, followed the basic language and structure of the bills originally considered by the subcommittee, but was modified to include terms of special parole "[i]n addition to any term of imprisonment" for the most serious substantive offenses. S. 3246, 91st Cong., 2d Sess., § 501(c)(1)(2) (1970).[18]

In modifying the substantive offense sections to accommodate the concept of special parole, the subcommittee neglected to effect a conforming change in the conspiracy section. Consequently, that section continued simply to provide that "[a]ny person who

[18] In addition, S. 3246 eliminated mandatory minimum penalties for all offenders except professional criminals involved in major distribution and importation of controlled substances (S. Rep. No. 91-613, 91st Cong., 1st Sess. 1 (1969)).

* * * conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the * * * conspiracy." S. 3246, *supra*, § 504. The bill was approved by the full committee and passed by the Senate in this form. 116 Cong. Rec. 1671 (1970).[19]

That the conspiracy section of S. 3246 was viewed as preserving the traditional sentencing congruence between conspiracy and substantive drug offenses was made clear when the administration's proposal was considered in the House of Representatives. Follow-

[19] During the Senate floor debates on S. 3246, discussion of the sentencing provisions contained in Title V of the bill focused exclusively upon new features eliminating mandatory minimum sentences for most offenses, doubling the penalty for sale of narcotics to minors, and imposing a separate scheme of penalties for continuing criminal enterprises. See 116 Cong. Rec. 996, 1181-1182, 1664-1665 (1970). While Senator Dodd, the floor manager of S. 3246, as well as Senators Hruska and Thurmond, members of the Judiciary Committee, briefly mentioned that special parole was authorized for trafficking offenses, there was no discussion of whether this penalty also was applicable to conspiracy offenses. Indeed, the conspiracy section was not even addressed during the debates. See 116 Cong. 996, 1182, 1665 (1970).

However, Senator Dodd introduced a chart comparing the penalty structure of S. 3246 with the penalty structure under existing drug legislation. The chart suggested that the penalty scheme for conspiracy offenses under S. 3246 was intended to parallel the scheme under existing law in that the maximum punishment authorized for conspiracy would be determined by the maximum punishment prescribed for the target offense. 116 Cong. Rec. 1653-1654 (1970).

ing passage of S. 3246 by the Senate, the administration introduced new legislation in the House containing identical features. H.R. 17463, 91st Cong., 2d Sess. (1970). See *Controlled Dangerous Substances, Narcotics and Drug Control Laws: Hearings on H.R. 17463 Before the House Comm. on Ways and Means*, 91st Cong., 2d Sess. 200 (1970) (hereinafter "H.R. 17463 Hearings"). During the hearings on H.R. 17463 before the Ways and Means Committee, BNDD Director Ingersoll, who previously had introduced the concept of special parole in the Senate, submitted a section by section analysis of the bill. After describing the various trafficking offenses for which special parole was authorized, Ingersoll explained that the sentencing scheme contemplated that conspiracy was to be punished to the same extent as object offenses, without exception:

> This section provides that a person may be punished for endeavoring or conspiring to commit an offense under this Act. *Upon conviction, his sentence may not exceed the punishment prescribed for the offense which was the object of the attempt or the conspiracy.*

H.R. 17463 Hearings at 223 (emphasis supplied). Thus, although the bill provided that conspiracy "is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for committing the [object] offense * * *" (S. 3246, *supra*, § 504), that language was viewed by the legislation's formulators not as limiting conspiracy sentences to fines and imprisonment, but rather as incorporating the maximum punishments authorized for object offenses.

This construction was not questioned at any time during the House hearings on the administration's bill. Following Ingersoll's testimony, the Ways and Means Committee received the Interstate and Foreign Commerce Committee's staff revision of the original bill.[20] Although the Interstate and Foreign Commerce Committee draft (H.R. 18583, 91st Cong., 2d Sess. (1970)) included a number of improvements and revisions not pertinent here, it retained the sentencing structure of both S. 3246 and H.R. 17463. Thus, while the authorized penalties differed in some respects from those contained in H.R. 17463,[21] H.R.

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[20] Prior to Ingersoll's presentation to the Ways and Means Committee, a Justice Department representative explained the sentencing structure adopted by the Senate in S. 3246 to a subcommittee of the Committee on Interstate and Foreign Commerce which was then conducting hearings on the initial administration proposal. See H.R. 13743 Hearings at 89-91. This testimony resulted in incorporation of the new sentencing structure in the version of the bill ultimately proposed by that committee. See H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., Pt. 1, 1-2 (1970).

[21] The new House bill removed the provisions relating to importation and exportation of controlled substances from the section prohibiting manufacture and distribution and placed them under a separate title designated the "Controlled Substances Import and Export Act." See H.R. 18583, *supra*, Title III, §§ 1000-1014. Compare S. 3246, *supra*, § 501(a) and H.R. 17463, *supra*, § 501(a) with H.R. 18583, *supra*, § 401(a). This revision was necessary because jurisdiction over the bill in the House was divided between two committees. The Interstate and Foreign Commerce Committee was responsible for

18583 perpetuated the scheme of its antecedents and made special parole mandatory whenever imprisonment was imposed for a serious trafficking offense.[22]

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and had jurisdiction over the trafficking, sale and distribution offenses contained in Title II while the Ways and Means Committee was responsible for importation and exportation offenses. See H.R. Rep. No. 91-1444, *supra*, at 1-3, 71-72.

Title III of the bill preserved the sentencing scheme for importation and exportation offenses that had existed in its antecedents, § 501(a) of S. 3246 and H.R. 17463. Thus, it required a special parole term whenever imprisonment was imposed for importation or exportation of narcotics or controlled substances listed in Schedules I through IV. It also included a conspiracy section identical to that contained in § 504 of S. 3246 and H.R. 17463. See H.R. 18583 §§ 1010, 1013. These importation and exportation sections are now codified as 21 U.S.C. 960, 963.

In addition to this modification in structure, the new House bill imposed lengthier terms of imprisonment for offenses involving Schedule I and Schedule II controlled substances. Compare §§ 401(b)(1)(A) and 401(b)(2) of H.R. 18583 with §§ 501(c)(1) and 501(c)(3) of S. 3246 and H.R. 17463. Finally, H.R. 18583 established five schedules of controlled substances whereas its precursors established four. Compare § 202 of H.R. 18583 with § 202 of S. 3246 and H.R. 17463.

[22] Whereas S.3246 and H.R. 17463 provided that "a special parole term *imposed under this Act* may be revoked if its terms and conditions are violated" (§ 501(d)), H.R. 18583 provided that "a special parole term *imposed under this section* [Section 401, the precursor of 21 U.S.C. 841] *or section 405* [the precursor of 21 U.S.C. 845] may be revoked if its terms and conditions are violated" (§ 401(c)) (emphasis supplied). Petitioner argues (Pet. Br. 30-31) that this change from a general reference to the Act to a specific reference to two sections of the Act demonstrates that Congress did not intend for special parole to be imposed under the conspiracy section as well. However, there is nothing in the legislative history to support the view that this language change was

Additionally, it retained its precursors' sentencing formula for conspiracy by incorporating by reference the sentences authorized for object offenses.

> [Conspiracy] is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the * * * conspiracy.

H.R. 18583, *supra*, § 406. This version of the legislation ultimately was adopted by both houses, signed by the President, and enacted into law as Pub. L. No. 91-513, 84 Stat. 1236. See 116 Cong. Rec. 30667, 35559, 37439 (1970). While there was brief discussion of some of the penalty provisions during the House and Senate floor debate on the final bill, the sentencing features of the conspiracy section were never mentioned. Thus, at no point was BNDD Director Ingersoll's view that the provision maintained the original complete congruence between sentences for conspiracy and object offenses ever drawn into question. See *e.g.*, 116 Cong. Rec. 33624-33634, 35052 (1970).[23]

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intended to narrow the applicability of special parole. Rather, it is most likely that the drafters of S.18583 simply looked to see what sections of the proposed bill used the term special parole, and inserted those section numbers into Section 401(c). As noted in the text, although the conspiracy section (§ 406) did not include the term special parole, it did incorporate the sentencing provisions of, *inter alia*, Section 401.

[23] There is no merit to petitioner's argument (Pet. Br. 32-33) that by expressly referring to special parole in the repeat offender sections (§ 508) of H.R. 17463 and S. 3246, Congress

3. Even absent the testimony of the administration's chief spokesman for the bill, Congress's broad objectives in enacting the penalty provisions of this legislation render it unreasonable to ascribe to it the intent to authorize special parole for isolated substantive offenses while withholding this major sentencing tool for conspiracy offenses.

The legislative history of the sentencing provisions clearly reflects Congress's desire to maximize the trial judge's flexibility in imposing sentences so that penalties might be tailored to fit individual offenders. See page 22 & note 17, *supra*. The elimination of mandatory minimum terms of incarceration, except where persons have engaged in a continuing criminal enterprise, and the keying of maximum fines and terms of imprisonment to the type of transactions entered into and the nature of the substance involved, were designed to permit judges to differentiate among addicts, first offenders, casual distributors and major

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implicitly demonstrated that it did not intend this penalty to extend to the conspiracy section. As we explained in the context of offenses involving distribution to minors (*supra*, pages 15-16), express reference to special parole was necessitated by the peculiar sentencing structure these bills adopted for second offenders. While the second offender provisions of these bills permitted courts to impose imprisonment up to twice that authorized for a first offender, it made mandatory a special parole term at least twice that authorized for a first offender whenever the court imposed confinement, regardless of its duration. Hence, as with offenses involving distribution to minors, express reference to special parole was necessary to make it clear that while doubled confinement was optional for second offenders, a doubled minimum term of special parole was mandatory.

traffickers. See, *e.g.*, 116 Cong. Rec. 1664, 33313-33314, 35052 (1970); H.R. Rep. No. 91-1444, *supra*, at 10-11. At the same time, the sentencing scheme was intended to deter professional criminals from engaging in trafficking drugs for profit. See, *e.g.*, 116 Cong. Rec. 1664, 35052 (1970); H.R. Rep. No. 91-1444, *supra*, at 10; S. Rep. No. 91-613, *supra*, at 7. Thus, the penalty structure established stringent sanctions, including lengthy terms of imprisonment and heavy fines for trafficking offenses, and in addition, required a mandatory minimum term of imprisonment without probation or suspension for engaging in a continuing criminal enterprise.

The concept of special parole was introduced to further similar ends. This new form of penalty was intended to foster rehabilitation through supervised community release. See S. 2637 Hearings at 676. At the same time, special parole was seen as a powerful disincentive to repetition of drug trafficking inasmuch as parole revocation would result in a further period of imprisonment equal in length to the special parole term, undiminished by time actually spent on parole prior to the violation. 21 U.S.C. 841(c). See *Bunker* v. *Wise*, 550 F.2d 1155, 1159 (9th Cir. 1977). Since the Act specifies only the minimum parole term, sentencing judges would be free in each case to impose whatever term they deem appropriate. See *Yothers* v. *United States*, 572 F.2d 1326, 1328 (9th Cir. 1978); *Bunker* v. *Wise*, *supra*, 550 F.2d at 1159; *Johnson* v. *United States*, 539 F.2d 1241, 1244 (9th Cir. 1976), cert. denied, 431 U.S. 918 (1977).

In view of these goals, it is simply inconceivable that Congress intended to withhold special parole as a means of penalizing those convicted of drug conspiracies. Petitioner has pointed to no reason why Congress would consider special parole a needed and appropriate response to substantive drug offenses, which might involve an isolated transaction by a single individual, yet would discard the same remedy for those who join together conspiratorially to accomplish the same end.[24] Concerted drug trafficking presents at least as great a threat to the community as specific acts of distribution,[25] and special parole is

[24] Petitioner argues (Pet. Br. 36-37) that Section 846 conspiracies need not be punishable by special parole where the object offense carries that penalty since "the most dangerous conspiracies" can be punished as continuing criminal enterprises under Section 848, and the persons involved in them can be sentenced as dangerous special drug offenders under Section 849. However, a person cannot be convicted of engaging in a continuing criminal enterprise unless he or she commits a drug offense that is "part of a continuing series of" such offenses, does so in concert with at least five other persons, occupies "a position of * * * management" vis-a-vis the others, and derives substantial income or resources from the enterprise. 21 U.S.C. 848(b). Similarly rigorous requirements must be satisfied before a person can be sentenced as a dangerous special drug offender. 21 U.S.C. 849(e) and (f). Given the resultant difficulty in obtaining convictions under these statutes as well as the far more severe sanctions imposed upon conviction, it is unreasonable to ascribe to Congress the intention to deny judges the authority to fix appropriate sentences for conspirators under Section 846.

[25] As this Court has recognized:

> [C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish.

Iannelli v. *United States*, 420 U.S. 770, 778 (1975), quoting *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961).

plainly every bit as appropriate in dealing with persons convicted of conspiracy as with substantive violators. In short, it defies logic, reason and experience to conclude, absent at least some evidence, that Congress intended the result urged by petitioner.[26]

[26] Petitioner contends (Pet. Br. 38-39) that Section 846 must be construed to preclude imposition of special parole in accordance with the doctrine that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States* v. *Culbert*, 435 U.S. 371, 379 (1978), citing *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). See *Simpson* v. *United States*, 435 U.S. 6, 14-15 (1978). But, as this Court noted in *United States* v. *Culbert*, *supra*, 435 U.S. at 379, the rule of lenity only applies when the statute is genuinely ambiguous, or uncertainty exists as to Congress's intent. See also *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 7. Thus, the rule of lenity is not implicated here. As we have shown, the Drug Abuse Act is plainly structured to incorporate by reference special parole as a penalty for conspiracy whenever it is authorized for the object offense. Moreover, the legislative history of the Act shows that Congress intended complete congruity between the penalties for conspiracy and the object offense.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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